

STEVEN E. CLYDE (Bar No. 0686)  
MATTHEW A. STEWARD (Bar No. 7637)  
CLYDE SNOW SESSIONS & SWENSON  
One Utah Center, Thirteenth Floor  
201 South Main Street  
Salt Lake City, Utah 84111  
Tel: (801) 322-2516  
Fax: (801) 521-6280

Attorneys for Defendant, Randolph Irrigation Company

I Rebecca Peart <sup>Deputy</sup> Rich County Clerk  
Do Hereby Certify That This Is A Full,  
True and Correct Copy of the  
Original.

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IN THE FIRST JUDICIAL DISTRICT  
OF RICH COUNTY, STATE OF UTAH

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ROSS MCKINNON,

Plaintiff,

vs.

RANDOLPH IRRIGATION COMPANY,

Defendant.

**ORDER AND JUDGMENT ON  
STIPULATED SETTLEMENT  
AGREEMENT**

Civil No.030100023 WA

Honorable Clint S. Judkins

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Plaintiff, Ross McKinnon ("McKinnon") and Defendant, Randolph Irrigation Company ("Company") have presented the Court with a written Stipulated Settlement Agreement to resolve and settle the above-referenced matter. The Court having reviewed the Stipulation and Settlement Agreement and being fully advised under the premises, enters the following:

**FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

1. McKinnon and the Company are represented by counsel and they both have had sufficient opportunity to consult with their respective counsel, and they freely, knowingly and

voluntarily entered into the Stipulated Settlement Agreement that is the basis for this Court's Order and Judgment.

2. McKinnon owns certain livestock water rights that entitle him to water livestock directly on Big Creek. McKinnon's water rights have been recognized in the Revised Proposed Determination entered in the general stream adjudication of the Bear River styled *In the Matter of the General Determination of the Rights to the Use of All the Water, Both Surface and Under Ground, Within the Drainage Area of the Bear River and All its Tributaries in Utah*, in the First Judicial District Court in and for Cache County, Rich County Division, State of Utah ("*Revised Proposed Determination*"). In accordance with the Revised Proposed Determination, McKinnon owns water right 23-2443 as supplemented by 23-2445. These water rights entitle McKinnon to water 205 head of cattle or their equivalents directly from Big Creek. McKinnon also owns water right 23-2442 as supplemented by 23-2444, under which McKinnon is entitled to water an additional 313 head of cattle or their equivalents directly from Big Creek. McKinnon also owns water right 23-532 (a26013) under which he has the right to divert water from a well at the rate of 0.022 cubic feet per second ("cfs") to provide stock water for 205 head of cattle or their equivalents, which water right is supplemental to 23-2443 and 23-2445, and therefore does not provide an additional water right for an additional 205 head of cattle, but is a supplemental right only. Under these water rights, McKinnon has the right to water a total of 518 head of cattle or their equivalents, with a total water right demand of 14.504 acre feet per year at the rate of 0.028 acre feet per year per head of cattle. Water rights 23-2443, 23-2445, 23-2442 and 23-2444 have priorities of 1870. The priority date of water right 23-532 (a26013) is 1934.

3. McKinnon presently owns approximately 270 head of cattle or equivalents. Said animals require 0.028 acre feet of water per head per year, or a total of 7.56 acre feet annually, however, as economic and water conditions permit, McKinnon will expand his herd back to the 518 head of cattle he is entitled to water on the stream, and therefore McKinnon expressly does not waive or relinquish his right to his full stock watering right.

4. The Company is the owner of certain water rights in Big Creek for irrigation and livestock watering purposes, which water rights have also been recognized in the Revised Proposed Determination as Water Rights 23-4, 23-458, 23-459, 23-460 and 23-461. The Company's water rights entitle the Company to divert water from Big Creek at a rate of 40 cfs for irrigation during the months of May through October, subject to its availability. Under these water rights, as supplemented by water rights from other sources, as referenced in the Revised Proposed Determination, the Company and its shareholders have the right to irrigate approximately 2500 acres of land in Rich County, Utah, of which 1330.2 acres are irrigated under the Company's Big Creek water rights. At a 3 acre feet per acre duty of water, the Company is entitled to divert 3,990.6 acre feet annually from Big Creek and approximately 7,500 acre feet total from all of its sources combined for irrigation and stock watering purposes. Additionally, the Company has the right to water 2000 head of cattle, 1,000 head of horses and 6,000 sheep from its irrigation diversions during the irrigation season and such water as it necessary during the non-irrigation season from Big Creek and its other sources of supply for livestock water with an 1870 date of priority. The Company's water rights 23-4 (the Kennedy

Ditch), 23-458, 23-459 and 23-461 have priorities of 1870. Water Right 23-460 has a priority of 1887.

5. That as between the Company and McKinnon, the above-referenced water rights of McKinnon and those water rights of the Company having a priority date of 1870 are of equal priority with each other and are of equal statutory preference under Utah Code Ann. §73-3-21 (irrigation and/or livestock use). The Company's water right 23-460 with a priority of 1887 is a second priority right and junior to those identified above, and McKinnon's under ground water right 23-532 is the third priority right, and is subordinate to the Company's 1870 priority water rights and its 1887 priority water right.

6. The parties acknowledge that several other individuals own stock watering rights with 1870 priorities directly on Big Creek and that these parties' water rights have been recognized by the Revised Proposed Determination. While these other water right owners were not parties to this action, McKinnon and the Company have acknowledged their water rights and have agreed that in compromising this matter, to also take these other water rights into consideration. Since these other water right owners are not parties to this action, they are not bound by this settlement. If any of these other water right owners should prevail in a suit against either party claiming interference with their stock watering rights, the parties' settlement and resulting Order shall be rendered void. The Company and McKinnon have agreed to join all persons claiming stock watering rights directly on Big Creek in any such new action for purposes of resolving the water right claims of all interested parties. These additional stock watering rights directly on Big Creek, with an 1870 priority, are identified as Water Rights 23-

2440, 23-2249, 23-22357, 23-2432, 23-2435, 232436, 232439, 23-2441, 23-2442, 23-2446, 23-2447 and 23-2448. All of the 1870 priority stock watering rights directly on Big Creek, inclusive of those owned by McKinnon, entitle the owners thereof collectively to deplete a total of 87.23 acre feet annually from Big Creek, subject to its availability. In order to provide a total quantity of 87.23 acre feet of water annually, there must be a continuous flow of water equal to 54.18 gallons per minute (gpm) or 0.1204 cfs in Big Creek at the Company's point of diversion for the Big Ditch. In addition, so long as McKinnon and the others water their stock directly from the stream, they are entitled to a sufficient flow of carrier water in the stream at the Company's point of diversion for the Big Ditch, so as to make available to the 1870 stock watering right owners directly on Big Creek, the flows required to provide them collectively with the 87.23 acre feet of water annually. The parties agree that a sustained flow of 1.75 cfs ("Agreed By-pass Flow") is the flow required to provide McKinnon and the other 1870 stock watering right holders the 87.23 acre feet of water required for the beneficial needs of their livestock. If McKinnon and the other stock watering right holders construct a pipeline or otherwise employ conservation measures to get their required stock water to their properties, that the need for carrier water may be significantly reduced or eliminated entirely in the case of a pipeline. Therefore, should such conservation measures be employed, the parties have agreed to revisit the carrier water issue and to make appropriate adjustments to minimize the wasting and loss of water to the system.

Based on the Foregoing Findings of Fact and Conclusions of Law and for good cause appearing, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

1. The Company, its shareholders, officers, directors/trustees and successors and assigns shall at all times by-pass at its Big Ditch point of diversion on Big Creek the Agreed By-Pass Flow, for the benefit of those owning the 1870 priority stock watering rights directly on Big Creek.

2. Any water in Big Creek in excess of 1.75 cfs may be diverted by the Company in satisfaction of its irrigation and stock watering rights up to the maximum diversion rate of 40 cfs during the irrigation season of May 1 through October 31, inclusive. If the total flow of Big Creek measured at the Gage exceeds 41.75 cfs, the Company's irrigation season diversions on Big Creek shall be limited to 40 cfs and all excess water will be allowed to flow down the channel of Big Creek for the benefit of the 1870 stock watering right holders and other downstream water users.

3. The United States Geological Survey has established a stream flow gage ("Gage") along Big Creek at a point Latitude 41°36'36" Longitude 111°15'12", and generally West of the Company's Kennedy Ditch diversion point. If stream flow in Big Creek measured at the Gage drops to a point that the Agreed By-Pass Flow equals 50% or more of the total measured flow of water in Big Creek at the Gage, then the Agreed By-Pass Flow shall be reduced so as to equal no more than 50% of the total measured flow in Big Creek at the Gage ("Reduced By-Pass Flow") and this Reduced By-Pass Flow shall be allowed to flow past the Company's Big Ditch point of diversion. This Reduced By-Pass Flow shall continue to be made available by the Company until

such time as the Reduced By-Pass Flow will not reach McKinnon's boundary adjacent to Highway 16 ("Futile Call"). At that point in time, the Company shall not be required to allow the water to run to waste to meet the Futile Call of McKinnon and the other 1870 stock watering right holders, but may divert and use all the available water up to the limits of its water rights in accordance with any lawful distribution orders of the State Engineer and his duly authorized River Commissioner, the Bear River Compact Commissioner and the local Water Master.

4. Before the Company may invoke the Futile Call provision of sub-paragraph 3 above, it shall notify McKinnon of its intent to do so. The parties shall jointly inspect the stream conditions and jointly concur that the by-passing of water to McKinnon would indeed be a Futile Call and would not reach his place of use or be of benefit to his livestock. Upon reaching that mutual agreement, the Company may divert rather than waste the available water in Big Creek as provided herein. In the event the parties cannot agree upon the futility of McKinnon's call for water, the parties may agree to mediate the dispute before the State Engineer, or they may proceed to court to assert and protect their respective water rights and the right to receive water under such stream conditions.

5. McKinnon, his heirs, legal representatives, successors and assigns shall be bound by the Agreed By-Pass Flow and/or the Reduced By-Pass Flow, as the case may be, and this is the total quantity of water the Company is required to allow to flow past its Big Ditch point of diversion to satisfy the 1870 priority stock watering rights on Big Creek below the Company's Big Ditch point of diversion.

6. Maintenance of the stream channel of Big Creek below the Big Ditch point of diversion shall be the sole responsibility of McKinnon and the others owning stock watering rights directly on Big Creek. The Company shall have no obligation or responsibility to remove vegetation, beaver dams and other obstructions from the stream channel that may impede the by-passed flows from reaching McKinnon and the others owning stock watering rights directly on Big Creek.

7. The Company is not a guarantor or warrantor that the Agreed By-Pass Flow and/or the Reduced By-Pass Flow will reach McKinnon and the Company shall have no responsibility beyond making the Agreed By-Pass Flow or the Reduced By-Pass Flow, as the case may be, available in Big Creek at the Company's Big Ditch point of diversion.

8. Should any provision of this Order and Judgment be declared null, void or unenforceable by any Court with jurisdiction, the remainder of the Order and Judgment shall remain in full force and effect.

9. Upon the agreement of the State Engineer, this Order and Judgment may be entered into and become a part of the Revised Proposed Determination and incorporated into the final decree to be entered by the Court in the General Adjudication of the Bear River.

10. This action matter is hereby dismissed with prejudice and on the merits, with each party bearing their own attorney's fees and costs incurred in this action.

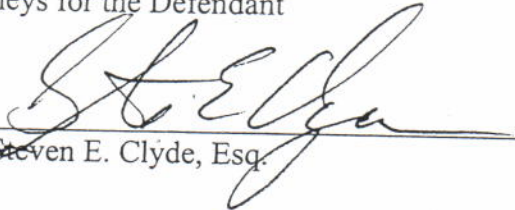


DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2003.

Approved as to form and Substance:

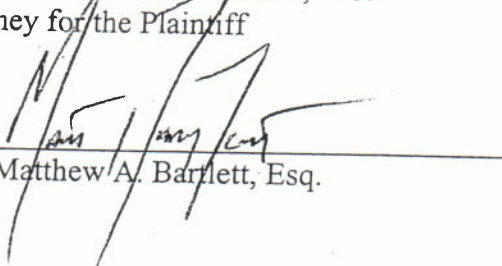
CLYDE SNOW SESSIONS & SWENSON, P.C.  
Attorneys for the Defendant

By:

  
Steven E. Clyde, Esq.

MATTHEW A. BARTLETT, P.C.  
Attorney for the Plaintiff

By:

  
Matthew A. Bartlett, Esq.

DATED this 9 day of Dec, 2003.

BY THE COURT:



HON. CLINT S. JENKINS  
First Judicial District Court Judge

